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No. 85-862

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

HUSTLER MAGAZINE, INC.,
Petitioner

v.

ROBYN DOUGLASS,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN REPLY OF PETITIONER

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BRIEF IN REPLY OF PETITIONER

Petitioner, Hustler Magazine, Inc. ("the Magazine"), respectfully submits this reply brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

INTRODUCTION

The opinion of the Court of Appeals is contrary to First Amendment jurisprudence in at least two respects. First, it holds Respondent has a cause of action for invasion of privacy based, not upon the falsity of the matter published, but rather upon the perceived offensiveness of the vehicle of publication (Appendix to Petition-

er's Brief at 14a-15a). Never before has a publication been required to respond in civil damages simply for being "offensive". Second, the opinion holds the actual malice of a co-defendant, Augustin Gregory, could be imputed to the Magazine, although the Magazine was as much a victim of his fraud as the Respondent (Appendix to Petitioner's Brief at 19a-20a).

Respondent makes no serious effort to address these case-dispositive issues. Instead, she has let loose a flurry of perjorative metaphors and mischaracterizations of the record. In doing so, she has addressed a number of issues—for example, the validity of her separate claim of commercial appropriation—which the Magazine has not raised in its Petition. Her apparent goal is to confuse the mind and appeal to the emotions. While this approach was successful with the jury, it cannot prevail here. A writ of certiorari should issue to allow this Court to redress the serious constitutional errors raised in the Magazine's Petition.

I. RESPONDENT'S FALSE LIGHT CAUSE OF ACTION IS UNCONSTITUTIONAL

Respondent has portrayed this case as a factual dispute over the falsity of the publication, without addressing the core constitutional issue presented by her false light claim. What is eminently clear, however, even from Respondent's own brief, is that her case is founded squarely on the allegedly degrading nature of her association with *Hustler* magazine. This point was highlighted by the Court of Appeals' opinion, which noted that Respondent would have had great difficulty stating a libel claim on a degrading association theory, but expressly held that a false light cause of action may be based on the perceived offensiveness of the vehicle of publication, regardless of the truth of the matter published (Appendix to Petitioner's Brief at 10a-11a; 16a).

The character of the Magazine is the essential element of Respondent's cause of action. In his closing argument to the jury, Respondent's counsel stressed that there was nothing wrong with appearing nude in *Playboy* (T. 1105), but that *Hustler* magazine is ". . . a terribly, terribly insidious publication . . .", ". . . a boil on the rump of society . . .", which he invited the jury to treat as a rectal irritation, and to deal with as such (T. 1101, 1122-23). The Court of Appeals was provided with the same arguments, and concluded that the *Hustler* setting was indeed degrading by applying its own standards of good taste to a sampling of the contents of the Magazine (Appendix to Petitioner's Brief at 11a-12a).

The degree of degradation perceived in the *Hustler* setting became, in the Court of Appeals opinion, the point of distinction between this case and decisions involving virtually identical facts, but publications that were only "tacky" compared to *Hustler* (Appendix to Petitioner's Brief at 12a). In reaching this result, the Court of Appeals has created a sliding constitutional standard based upon the vehicle of publication and the court's own perceptions of taste. No one could seriously argue that such a doctrine would pass constitutional muster in the area of libel; no lesser standard should be permitted in causes of action based upon the false light doctrine.

Respondent now seems to claim that her case does not present these constitutional problems because the publication was false both in creating an impression of voluntary association between Respondent and *Hustler*, and in imputing lesbianism to the patently erotic activities of the two women who posed nude with each other for the photographs. The Court of Appeals held, however, that both of these were not necessary, and that Respondent had a separate cause of action for each allegedly false impression.

Respondent's claim of voluntary association, however, is no different from those asserted in *Ann-Margret* v.

High Society Magazine, 498 F.Supp. 401 (S.D.N.Y. 1980), and *Falwell* v. *Penthouse International, Ltd.*, 521 F.Supp. 1204 (W.D. Va. 1981), both of which involved unauthorized publications. If the Court of Appeals is correct in upholding Respondent's voluntary association theory, these two cases must have been wrongly decided. It is hard to conceive of a stronger case for an imputation of voluntary association than one involving the unauthorized publication of an interview—the exact situation presented in *Falwell*. Unfortunately, the holding in this case illustrates the direction in which a substantial portion of recent case law has evolved, and it is a perfect example of the diminished constitutional protections that have been applied in false light cases.

If any principle is fundamental to this Court's First Amendment jurisprudence, it is that liability for speech turns on its content, not the identity of the speaker. In holding that Respondent has a cause of action against the Magazine premised upon the mere suggestion of a voluntary association by the fact of publication,[1] the Court of Appeals has adopted an approach which is fundamentally at odds with this principle. Unless this case is reviewed by this Court, publications across the country will be faced with the prospect of responding in damages for accurate depictions of public figures who simply object to the vehicle of publication. *Cf. Falwell* v. *Penthouse International, Ltd.*, 521 F.Supp. 1204 (W.D. Va. 1981).

II. THE COURT OF APPEALS FORSOOK ITS CONSTITUTIONAL DUTY TO DETERMINE THE EXISTENCE OF ACTUAL MALICE

In its initial opinion, the Court of Appeals held that a "reasonable jury" could infer that the Magazine acted with actual malice (Appendix to Petitioner's Brief at 19a).

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[1] The statement regarding voluntary appearances by models to which Respondent refers at pages 9 and 16 of her brief appeared in an earlier issue, and was not shown to be false when made (PX 24, p. 5).

In its Petition for Rehearing, the Magazine advised the Court of Appeals (for the third time) that this Court's decision in *Bose Corp.* v. *Consumer's Union*, 466 U.S. 485 (1984), required it to conduct an independent review of the record to ensure that the jury's verdict was founded upon clear and convincing evidence of actual malice. In its Supplemental Opinion on Rehearing, the Court of Appeals cited the difficulty of making such a determination "without benefit of having seen and heard live witnesses" and went on to reach the perfunctory conclusion that "the jury's finding was not only within the bounds of reason, but was, so far as we are able to determine from the cold record, a correct finding" (Appendix to Petitioner's Brief at 35a).

In *Bose* this Court held that the requirement of independent appellate review of actual malice findings:

> . . . emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'. 466 U.S. at 510-11.

The belated and perfunctory "independent review" conducted by the Court of Appeals can hardly be described as the kind of careful analysis required of an "expositor of the Constitution". Moreover, the Court of Appeals has still not properly discharged its duty. The jury's finding which it found was probably "correct" was, as the Court

of Appeals itself found, based on the erroneous preponderance of evidence standard, and the Court of Appeals does not disclose what standard it used in its review.

As the Respondent's brief quite correctly points out, there were only three arguable bases for a finding of actual malice in this case: (1) the imputation of Gregory's liability to the Magazine, (2) the mental state of Bruce Helford, the copywriter, and (3) the Magazine's alleged "refusal" to halt publication of the January, 1981 issue, after being warned to do so by Respondent's attorney. None of these claims have any merit whatsoever.

Respondent's selective reliance on Gregory's testimony to support her claim is, at best, puzzling. After all, Gregory testified that he supplied the Magazine with valid releases (T. 945, 948). In addition, the portions of Gregory's testimony which are favorable to Respondent are subject to substantial doubt because, according to his own attorney, on the first day of trial he entered into a secret agreement with Respondent's counsel to "claim agency" on the part of the Magazine in return for a covenant not to execute any judgment Respondent might recover against Gregory (R. 212(a)(1), p. 14).

The Court of Appeals, citing this Court's decision in *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1975), held that Gregory's conduct could be imputed to the Magazine by means of the doctrine of *respondeat superior* (Appendix to Petitioner's Brief at 20a). But, as the Magazine's Petition for a Writ of Certiorari demonstrates, if Gregory provided the Magazine with forged releases, he was acting outside the scope of his employment as Photo Editor. These photographs were a freelance contribution from Gregory (T. 952, 1000). Gregory entered into a written contract of sale with the Magazine for the photographs (PX 48). He was paid with a manually-written check, not a computer-processed check used to pay his salary (T. 1000-01). None of the

amounts usually deducted from salary checks were withheld (T. 609-11; DX 37), and Gregory left the Magazine's employ shortly after the sale (T. 534).

These facts serve to distinguish the instant case from *Cantrell*. Here, Respondent was required to prove that those in charge of the Magazine in fact entertained serious doubts as to the truth of the publication, and, having such doubts, proceeded with publication anyway. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). Even assuming, *arguendo*, that Gregory had been given responsibility for publication (a fact contradicted by the evidence, T. 592), his conduct in defrauding the Magazine cannot under Illinois law be imputed to the Magazine. *See Montgomery* v. *Commercial Trust & Savings Bank*, 286 Ill. App. 241, 246, 3 N.E. 2d 139 (1st Dist. 1936).

Similarly, the conduct of Bruce Helford, the copywriter who composed the text which accompanied Respondent's photographs, cannot give rise to a finding of actual malice. Where, as here, an author expresses an opinion with a disclosed factual basis (the photographs of Respondent), that statement of opinion cannot give rise to liability. *Rinsley* v. *Brandt*, 700 F.2d 1304 (10th Cir. 1983). If there were any imputation of homosexuality in the Magazine's article, that imputation arose as a result of the photographs themselves. The article never used the words "lesbian" or "homosexual". Plaintiff admits that she voluntarily posed for these photographs and that she found nothing offensive about them. When two women pose for pictures of the type contained in the article, a reasonable person could infer that the photographs depicted a lesbian encounter. The photographs speak for themselves. If, instead of these photographs, the Magazine had published photographs of Respondent fully-clothed, standing five feet away from another fully-clothed woman, the alleged imputation of homosexuality would not exist. Simply put, if you take the photographs away, the words are innocent. Thus, if any person created the impression that Respond-

ent was a lesbian, it was Respondent herself when she posed for the photographs.

Finally, Respondent's suggestion that the Magazine ignored the admonition from her attorney not to publish her photographs is seriously misleading. The undisputed fact is that the January, 1981 edition of the Magazine was completed and shipped to wholesalers and subscribers on November 7, 1980, a full ten days before Respondent's attorney first contacted the Magazine's attorney (T. 149-50, 916-17). Indeed, Respondent admits in her brief that she obtained a copy of the January issue from a local news vendor before contacting her attorney (Respondent's Brief at 7). This is hardly clear and convincing evidence of actual malice.

CONCLUSION

For all of the foregoing reasons, as well as those urged in its original brief, the Magazine's petition for a writ of certiorari should be granted.

Respectfully submitted,

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